IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case: 3:16-CR-50008**
	)	
DEBORAH RYBA,	)	
	)	
Defendant.	)	

DEFENDANT RYBA'S MOTION TO QUASH INDICTMENT BECAUSE GRAND JURY WAS NOT PROPERLY INSTRUCTED ON ALL ELEMENTS OF ALLEGED OFFENSES

The defendant, Ms. Ryba, moves this Court to dismiss the indictment because the United States did not properly instruct the grand jury on the elements of Counts 1 & 2. Therefore, Ms. Ryba was deprived of her constitutional right under the Fifth Amendment to the U.S. Constitution to have an unbiased grand jury consider all the elements of the alleged offenses. Because Counts 3 & 4 are based on the promotion of the illegal activity alleged in Counts 1 & 2, the entire indictment must be dismissed.

STATEMENT OF FACTS

1. On July 5, 2016, the Unites States Attorney's Office for the Western District of Virginia (U.S. Attorney) presented evidence to the grand jury to obtain the indictments in this case.

2. On July 19, 2016, the U.S. Attorney again presented evidence to the grand jury in order to obtain the superseding indictments in this case.

3. Counts 1 and 2 of the superseding indictment involve the distribution and importation of the substances 3,4-Methylenedioxypyrovalerone (MDPV) and *alpha*-Pyrrolidinopentiophenone (aPVP).

4. In both grand jury sessions, the U.S. Attorney, through an Assistant U.S. Attorney (AUSA), presented the testimony of Special Agent Robert Smith (SA Smith).

5. Both sessions of the grand jury were held after the Supreme Court issued its opinion in McFadden v. United States, 135 S. Ct. 2298 (2015).

6. In the July 5 session of the grand jury (Ex. 1), the AUSA consistently referred to MDPV and aPVP as controlled substances, controlled substance analogues, bath salts, synthetic drugs, etc., for example:

a. On page 16 at line 11:

> AUSA: And is it accurate that the law says you can treat, investigate, and prosecute controlled substance analogs the same way if they're intended for human consumption, the chemical structure of the mixture or substance is substantially similar to the chemical structure of a controlled substance in Schedule 1 or 2 of the Controlled Substances Act, and that the mixture or substance has an actual, intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule 1 or 2 of the Controlled Substance Act?
>
> SA Smith: Yes, that is correct.

b. On page 34 at line 2:

> AUSA: What type of drugs were encountered in this investigation? Let me ask it this way, were controlled substance and analogs encountered in this investigation?
>
> SA Smith: Yes.

AUSA: Was MDPV one of the controlled substance analogs encountered in this investigation?

SA Smith: Yes.

c. On page 35 at line 9:

AUSA: During this investigation, did you all also encounter controlled substances?

SA Smith: Yes.

AUSA: Was one of the controlled substances MDPV?

SA Smith: Yes.

AUSA: Was one of the controlled substances alpha PVP?

SA Smith: Yes.

d. On page 36 at line 1:

AUSA: Before, I'm sorry to interrupt you, but before we move off of MDPV, you testified that on October 21, 2011, MDPV becomes a Schedule 1 controlled substance, right? Correct?

SA Smith: Yes, October 21st, 2011, controlled substance.

AUSA: And that official act can be found in 76 Federal Register 65371; correct?

SA Smith: Yes.

AUSA: Now before that date, the DEA had concluded that MDPV was a controlled substance analog of methcathinone; correct?

SA Smith: Yes.

AUSA: Which is a Schedule 1 or Schedule 2 controlled substance?

SA Smith: Yes.

AUSA: And is it accurate that from May 1st, 1992, all the way until the date you just provided a minute ago, October 21, 2011, MDPV was considered an analog, a controlled substance analog of methcathinone?

SA Smith: Yes.

AUSA: And then you were about to testify a moment ago about alpha PVP.

SA Smith: Yes. Alpha PVP was identified as an analog of MDPV from October 21st, 2011, until it was scheduled on March 7th of 2014.

AUSA: And that became a Schedule 1 controlled substance on that date per 79 Federal Register 12938; correct?

SA Smith: Yes.

AUSA: So the time period in which, correct me if I'm wrong, but the time period in which alpha PVP was considered a controlled substance analog of MDPV was from October 21, 2011, when MDPV became a controlled substance, Schedule 1 controlled substance, up to March 7, 2014; correct?

SA Smith: Correct.

e. On page 40 at line 20:

AUSA: And in this investigation when members of the conspiracy obtained these synthetic drugs from the companies in China, at some points in time in the investigation they were controlled substance analogs and at other times later on in the conspiracy some of these had already been scheduled as Schedule 1 controlled substances back in the U.S.; correct?

SA Smith: Yes.

f. On page 91 at line 15:

AUSA: Let's shift to the evidence regarding the importation of synthetic drugs and Schedule 1 substances in this investigation. What chemicals, what synthetic drugs were imported into the United States in this investigation?

SA Smith: MDPV and alpha PVP.

AUSA: MDPV and alpha PVP were two of the chemicals; correct?

SA Smith: Correct.

g. On page 100 at line 20:

> AUSA: MDPV and alpha PVP have a stimulant and hallucinogenic effect on the central nervous system similar to or greater than the stimulant effect on the central nervous system of a Schedule 1 controlled substance and that they did so with the intent that MDPV and alpha PVP would be used for human consumption; correct?
>
> SA Smith: Yes.

h. On page 110 at line 25:

> AUSA: Is it true that on or about October 21, 2011, MDPV became a Schedule 1 controlled substance?
>
> SA Smith: Yes.
>
> AUSA: On that same day, alpha PVP became a Schedule 1, excuse me, became a controlled substance analog; correct?
>
> SA Smith: Correct.

7. In the July 5 grand jury session, the AUSA also presented the grand jury with the prior grand jury testimony of a spouse of an alleged co-conspirator (Ex. 2). The spouse was intimately familiar with details of the alleged conspiracy and she consistently stated that alleged co-conspirators believed the substances at issue were legal. (See page 16, lines 8-9; page 17, lines 1-3; page 19, lines 10-12, page 22, lines 23-25; page 23, lines 4-6; page 23, lines 13-15; page 26, lines 1-7; page 26, lines 15-18; page 45, lines 19-22; page 47, lines 16-18; page 49, lines 13-18; page 50, lines 1-3; page 56, lines 1-4).

8. In the July 5 grand jury session (Ex. 1), a grand jury asked the following question on page 139, line 6 and was provided the following answer by SA Smith:

> Grand Juror: All right. My first question, at the very beginning, and he deferred the question, for the analog drugs that are still not Schedule 1 drug but it's an analog drug, is it still an illegal even though it's been not put on Schedule 1 until October of that year? Was it illegal prior to that?

> SA Smith: Yes, it's covered under the controlled substance analog portion where as long as that substance met that criteria, substantially similar to a controlled substance, it has pharmacological effect that was similar to the controlled substance, and for human consumption. So as long as you have those elements, then, yes, it's illegal.

9. The AUSA then gives the following definition of a controlled substance analogue, starting at page 140, line 19 (Ex. 1):

> AUSA: And to prove that the mixture of substance is a controlled substance analog you have to find probable cause that, one, the chemical structure of the mixture or the substance is substantially similar to the chemical structure of a controlled substance in Schedule 1 or Schedule 2 of the Controlled Substances Act and, two, that the mixture or substance has an actual intended or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule 1 or Schedule 2 of the Controlled Substance Act.
>
> And then, in addition to those elements, you must find probable cause to prove, excuse me, probable cause that the defendant knew that the substance involved in the conspiracy was a controlled substance analog. Circumstantial evidence from which you are entitled to infer that the defendant knew the substance was a controlled substance analog under the Federal Drug Abuse laws might include, for example, the defendant's concealment of his activities, evasive behavior with respect to law enforcement, knowledge of a particular substance, knowledge that a particular substance produces a high similar to that produced by controlled substance, or knowledge that a particular substance is subject to seizure at Customs.

10. The AUSA provide additional information on the definition of a controlled substance analogue at page 142, line 7 (Ex. 1):

> AUSA: And then the government can also establish, it doesn't have to establish, but the government can establish that the defendant had the required knowledge in another way by proving that the defendant knew the characteristics or features of the substance that make it a controlled substance analog. This alternative method of establishing knowledge requires that the government prove that the defendant knew that the substance had the chemical structure substantially similar to a Schedule 1 or 2 controlled substance and also knew that the substance had or was represented to have or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially

similar to or greater than that of a Schedule 1 or Schedule 2 controlled substance.

11. Finally, on pages 157-58, the following exchange took place between the AUSA, SA Smith, and several grand jurors, starting at line 7 on page 157 (Ex. 1):

AUSA: Agent Smith, you testified previously that the substance MDPV became a Schedule 1 controlled substance on October 21, 2011; correct?

SA Smith: Correct.

AUSA: Prior to that, it was a controlled substance analog; correct?

SA Smith: Correct.

AUSA: Still enforceable under the law as long as it satisfies the statutory definition, the legal definition entirely, of a controlled substance analog; correct?

SA Smith: Correct.

AUSA: And then after that date, from October 21, 2011 and forward, it's then a Schedule 1 controlled substance; correct?

SA Smith: Correct.

GRAND JUROR: Now does that justify, the way it, because we were supposed to find out if it was a substance one or whatnot, right? Controlled substance.

GRAND JUROR: They're not leaving us to figure that out.

GRAND JUROR: That's not what we, that's what they are charging them. We don't have to decide that.

GRAND JUROR: They're saying that both the analog and the regular drug were equally illegal and not able to be brought here.

AUSA: Let's do this, folks. We're going to let you all, in a moment we'll let you deliberate and discuss. And if you need us to come back in to answer any questions, we can do that.

12. That conversation (Ex. 1, page 157, line23) between the grand jurors was not clarified or further addressed by the AUSA or SA Smith and the grand jury subsequently issued the original indictments in this case.

13. When the grand jury met on July 19 and issued the superseding indictments, the July 5 conversation between the grand jurors was not addressed.

ARGUMENT

"The institution of the grand jury is deeply rooted in Anglo-American history." United States v. Calandra, 414 U.S. 338, 342 (1974). "The grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action." Calandra, 414 U.S. at 342-43. "Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings." Id. at 343. "The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement." Id.

"The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment." Stirone v. United States, 361 U.S. 212, 218-19 (1960). "The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true." Bracy v. United States, 435 U.S. 1301, 1302 (1978). "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." Costello v. United States, 350 U.S. 359, 363 (1956).

However, several jurisdictions, both state and federal, have held that an indictment may be challenged based on Government misconduct in several situations. See e.g., United States v. Mechanik, 475 U.S. 66, 78 (1986) (O'Connor concurring) (when violation substantially influences grand jury decision to indict); United States v. Udziela, 671 F.2d 995, 1001 (7th Cir. 1982) (holding that an indictment may be challenged based on perjured testimony); United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979) (intentional suppression of favorable testimony); United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974) (indictment based on perjured testimony); United States v. Lawson, 502 F. Supp. 158, 172 (D. Md. 1980) (dismissing indictment because prosecutor's questions to witness were deliberately misleading and calculated to create a false impression); State ex rel. Pinson v. Maynard, 181 W. Va. 662, 669 (1989) (holding that indictment can be challenged based on perjured or misleading testimony).

Additionally, courts may dismiss an indictment if government misconduct substantially influences a grand jury's decision to indict. Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988); see also United States v. Derrick, 163 F.3d 799, 807-08 (4th Cir. 1998); United States v. McDonald, 61 F.3d 248, 253 (4th Cir. 1995). In order to dismiss an indictment, a court must find that the errors in the grand jury proceedings prejudiced the defendant. Nova Scotia, 487 U.S. at 254; see also United States v. Brewer, 1 F.3d 1430, 1433 (4th Cir. 1993) (erroneous testimony regarding venue required dismissal). But courts must also conduct a harmless error analysis. Id. However, if the "structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice," then the harmless error analysis is unnecessary. Id. at 257. Further, if the grand jury's independence was infringed upon, "[s]uch an infringement may result in grave doubt as to a violation's effect on the grand jury's decision to indict." Id. at 259. "If violations did substantially influence th[e] decision [to indict], or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless." Id. at 263.

"[A]n indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis." United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999). This includes implied and necessary elements such as "knowingly" or "willfully," which are not included in the statute but are clearly derived from case law. Du Bo, 186 F.3d at 1179. "At common law, 'the most valuable function of the grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony . . ..'" Id. (quoting Hale v. Henkel, 201 U.S. 43, 59 (1906)).

The Fifth Amendment requires that all elements of an offense are considered and found by the grand jury. United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988) (citing Stirone, 361 U.S. at 219). "An essential element of a crime -- one that affects a substantial right -- is 'one whose specification . . . is necessary to establish the very illegality of the behavior and thus the court's jurisdiction.'" Hooker, 841 F.2d at

1231(quoting United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983), cert. denied, 464 U.S. 991 (1983)). Therefore, if a grand jury fails to consider an essential element of a crime, this affects a substantial right under the Fifth Amendment. In this situation, "the absence of prejudice to the defendant in a traditional sense does not cure a substantive, jurisdictional defect in an indictment." Id. (citing United States v. Smith, 553 F.2d 1239, 1242 (10th Cir. 1977).

In both Hooker and Du Bo, a Circuit Court of Appeals held that a missing element in the indictment required dismissal of the relevant counts because the indictments could not comply with the Fifth Amendment requirement that the grand jury find probable cause on all elements of a crime. Id. at 1232; Du Bo, 186 F.3d at 1179. In Ms. Ryba's case, it is apparent that the grand jury did not understand the "knowledge" elements of Counts 1 and 2. The grand jury was required find probable cause that Ms. Ryba "knew that the substance with which [s]he was dealing is some controlled substance … by operation of the Analogue Act" or that she knew (1) the substance was "substantially similar to the chemical structure" to a controlled I or II substance and (2) has an effect on the central nervous system substantially similar to or greater than a controlled I or II substance. McFadden, 135 S. Ct. at 2305.

Both the AUSA and SA Smith continuously referred to MDPV and aPVP as controlled substances, controlled substance analogues, synthetic drugs, etc. These references were presented to the grand jury as a forgone conclusion that the substances at issue were illegal. However, the grand jury was still confused on this issue. When a grand juror specifically asked SA Smith (Ex. 1, page 139, line 6) whether the substances at issue were "illegal prior" to being scheduled, SA Smith gives an incomplete definition of a controlled substance analogue that does not include the knowledge element per the Supreme Court's opinion in McFadden. Erroneous instructions on the applicable law has been held within this Circuit to cause grave doubt that the grand jury's decision to indict was free from substantial influence. United States v. Stevens, 771 F. Supp. 2d 556, 568 (D. Md. 2011) (holding that erroneous instruction on advice of counsel defense in response to grand juror question that went to "the heart of the intent required to indict" required dismissal).

The AUSA attempted to clarify the definition of a controlled substance analogue, but this was clearly not understood. The grand jury confusion culminates (Ex. 1, page 157, line 23) when several grand jurors had the following discussion:

> GRAND JUROR: Now does that justify, the way it, because we were supposed to find out if it was a substance one or whatnot, right? Controlled substance.
>
> GRAND JUROR: They're not leaving us to figure that out.
>
> GRAND JUROR: That's not what we, that's what they are charging them. We don't have to decide that.
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> GRAND JUROR: They're saying that both the analog and the regular drug were equally illegal and not able to be brought here.
>
> AUSA: Let's do this, folks. We're going to let you all, in a moment we'll let you deliberate and discuss. And if you need us to come back in to answer any questions, we can do that.

At this point, the AUSA must clarify the instructions on the law, i.e., the grand jury must find that Ms. Ryba possessed the required knowledge of a controlled substance analogue. "The prosecutor has a duty of good faith to the Court, the grand jury, and the defendant." Samango, 607 F.2d at 884 (quoting Basurto, 497 F.2d at 786) (emphasis added).

Leaving the grand jury with this mistaken understanding of the law is no different than the erroneous instruction given in Stevens and requires dismissal. Stevens, 771 F. Supp. 2d at 568 (even in the absence of "willful prosecutorial misconduct," erroneous instruction on the law still requires dismissal where there are grave doubts regarding grand jury's decision to indict); see also, United States v. Feurtado, 191 F.3d 420, 424 (4th Cir. 1999). Instead of correcting the grand jury's incorrect understanding of the law, the AUSA changed the subject and told the grand jury they could soon start their deliberations. The grand jury clearly was under the impression that they did not need to find probable cause to believe that Ms. Ryba knew she was dealing with a controlled substance analogue. This is especially troubling considering the co-conspirator's spouse's repeated references to co-conspirators believing the substances at issue were legal. (Ex. 2).

The grand jury's independence to determine probable cause on all elements of the offense has been infringed upon. Nova Scotia, 487 U.S. at 259. This casts grave doubt on the grand jury's decision to indict Ms. Ryba on drug trafficking crimes. Id. Further, because these violations substantially influenced the grand jury's decision to indict, the violations cannot be deemed harmless. Id. at 263. After all, finding that the Government has met all elements of the offense is necessary to the jurisdiction of this Court. Hooker, 841 F.2d at 1231. Further, this violation "at least casts grave doubt that [the grand jury's] decision was free from such influence." Nova Scotia, 487 U.S. at 263.

Therefore, Ms. Ryba moves this Court to dismiss the superseding indictment against her.

CONCLUSION

Ms. Ryba moves this Court to dismiss the indictment because the United States did not properly instruct the grand jury on the elements of Counts 1 & 2. Therefore, Ms. Ryba was deprived of her constitutional right under the Fifth Amendment to the U.S. Constitution to have an unbiased grand jury consider all the elements of the alleged offenses. Because Counts 3 & 4 are based on the promotion of the illegal activity alleged in Counts 1 & 2, the entire indictment must be dismissed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2017, I have filed the foregoing pleading through the ECF system, which shall then send an electronic copy of this pleading to all other counsel of record in this matter.

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